91-2057

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WOLPOFF & ABRAMSON,
PETITIONER,

v.

SUSAN CARROLL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

RONALD S. CANTER*
7272 Wisconsin Avenue
4th Floor
Bethesda, Maryland 20814-4838
(301) 951-8500
Counsel for Petitioner

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Fourth Circuit's determination that the Fair Debt Collection Practices Act requires an attorney debt collector to comply with the disclosure requirement set forth in 15 U.S.C. § 1692e(11) in a post-judgment, follow-up letter is contrary to Congressional intent that the Act not interfere with the practice of law by the nation's attorneys and inconsistent with the prior judicial and administrative interpretations of the Act which were incorporated into the 1986 amendment through Congressional acquiescence.

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Wolpoff and Abramson petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, A1-A5) is not yet reported. The opinion of the District Court granting Wolpoff and Abramson's motion for summary judgment (App. B, *infra*, B1-B4) is not reported.

JURISDICTION

Judgment was entered by the U.S. Circuit Court of Appeals for the Fourth Circuit on March 30, 1992. (App. A, *infra*, A1-A5). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

15 U.S.C. § 1692e is reproduced in Appendix F.

STATEMENT

1. This case arises from an attempt to collect a delinquent Macy's department store charge account by Petitioner, the law firm of Wolpoff & Abramson (hereinafter "W&A"), from Mrs. Susan Carroll (then known as Mrs. Susan Miller), the obligor of the account. App. D, *infra*, D2-D3. Mrs. Carroll sued W&A alleging that the law firm violated § 1692e(11) of the Fair Debt Collection Practices Act (hereinafter "FDCPA") for failing to include a disclosure notice on a follow-up letter sent to her seeking payment on a judgment entered against her twelve days earlier.[1] App B, *infra*, B1.

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[1]15 U.S.C. § 1692e(11) states, in pertinent part, that a debt collector must "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." App E.

W&A's initial communication with Mrs. Carroll occurred on August 9, 1989 in a letter in complete conformity with all provisions of the FDCPA. App. D, *infra*, D2. The letter requested Mrs. Carroll either pay the account or contact the law firm. *Id.* Mrs. Carroll failed to respond to the letter. *Id.* The same letter was again mailed on November 11, 1989 with a similar result.[2] *Id.*

After failing to collect the debt without legal action, W&A filed suit against Mrs. Carroll in the District Court of Maryland for Cecil County on January 18, 1990. App. D, *infra*, D3. On May 30, 1990, Mrs. Carroll appeared in open Court and admitted she owed the debt. App. B, *infra*, B1. Judgment by consent was accordingly entered in favor of Macy's in the amount of $1,841.11 plus court costs and a 15% attorneys fee. *Id.*

On June 11, 1990, twelve days after judgment was entered against Mrs. Carroll, W&A mailed a third letter to her requesting that she make payment of the debt which was now reduced to judgment.[3] App. D, *infra*, D4. This two sentence, four line letter, written on law firm stationary, read as follows:

Your past due account is in our office for legal action. It is imperative that you contact us immediately if you wish to make arrangements to pay this debt prior to additional litigation. Very truly yours, Wolpoff and Abramson. App. A, *infra*, A2.

Once again, Mrs. Carroll failed to respond to the letter or

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[2]Not only did the two letters contain all of the disclosures required by 15 U.S.C. § 1692, but the final sentence of each also repeated verbatim the language found in subpart (e)(11). App D, *infra*, D2.

[3]Prior to this letter, Mrs. Carroll was notified on at least five occasions that W&A was trying to collect a debt from her: The two pre-litigation letters on August 9 and November 11, 1989; the summons to appear in court and accompanying court pamphlet; the actual court appearance which Mrs. Carroll made; and the court provided notice of entry of judgment, which included a pamphlet explaining the judgment creditor's (Macy's) options to enforce the judgment. App. D, *infra*, D1-D4.

make payment on the account. App. D, *infra*, D4. Before W&A was able to collect on the judgment, on February 4, 1991, Mrs. Carroll filed a petition in federal bankruptcy court seeking to discharge her debts, including the instant one. *Id.*

2. On May 2, 1991 Mrs. Carroll filed a Complaint in the United States District Court for the District of Maryland alleging that W&A violated 15 U.S.C. § 1692e(11) by failing to include in its June 11, 1990, post-judgment, follow-up letter a warning that the letter was an attempt to collect a debt and any information would be used for that purpose. App. B, *infra*, B1.

The District Court granted W&A's motion for Summary Judgment. Noting the conflicts among the Circuit Courts concerning the applicability of the § 1692e(11) disclosure provision to follow-up correspondence, the District Court adopted the reasoning in *Pressley v. Capital Credit and Collection Service, Inc.*, 760 F.2d 922 (9th Cir. 1985), and held that an attorney who earlier obtained a judgment against a debtor need not repeat the § 1692e(11) disclosure in a follow-up letter "where the (debtor) well knew about the debt, having only days earlier appeared in Court to have a judgment entered against her..." App. B, *infra*, B2. As the court further noted, forcing W&A to notify Mrs. Carroll for the sixth time that it was attempting to collect a debt "simply makes no sense and serves no useful purpose." *Id.*

3. The Fourth Circuit reversed. App. A, *infra*, A5. That court, rejecting a comprehensive examination of the purpose and intent of the FDCPA, found W&A liable for failing to include the § 1692e(11) disclosure warning in its post-judgment, follow-up letter. Conceding that the "equities here are one step removed because a judgment on the debt preceded the follow-up letter at issue," the Fourth Circuit, nonetheless, held as a matter of law that the literal language of the statute "makes no distinction between initial and subsequent communications" and accordingly found that the law firm violated the statute. *Id* at A4.

REASONS FOR GRANTING THE PETITION

The decision below, as well as one rendered by the Second Circuit, squarely conflicts with a decision of another federal court of appeals that holds that a debt collector need not repeat the § 1692e(11) disclosure notice in follow-up letters. *Compare Carroll v. Wolpoff & Abramson*, App. A, *and Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22 (2d Cir. 1989) *with Pressley*. This conflict has a profound impact on the practice of law by the nation's attorneys, a result contrary to congressional intent. Congress intended a uniform application of the FDCPA on a nationwide basis. The resultant split in the circuits combined with an FTC opinion interpreting the Act, (FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986). App. E.), was ignored by two of the three Circuit Courts and has impeded the practice of law by many attorneys, exposing them to different liabilities and standards depending on the jurisdiction in which the debtor is contacted.

Second, the United States Court of Appeals for the Fourth Circuit erroneously expanded the intended scope of the Act's coverage by requiring that § 1692e(11) disclosure notices be placed in every communication, including presumably those of a purely legal nature. Quite simply, the Fourth Circuit failed to adequately consider congressional intent in the passage of the FDCPA and instead applied an inflexible, over-reaching rule.

Moreover, the Fourth Circuit completely disregarded two opinions which were incorporated into the Act through congressional re-enactment of the statute in 1986. Prior to the 1986 amendment repealing the attorney-at-law exemption, both the U.S. Court of Appeals for the Ninth Circuit and the Federal Trade Commission agreed that the § 1692e(11) disclosure notice need not be repeated in follow-up correspondence sent to debtors.

1. Inconsistent Circuit Court Opinions are Contrary to a Uniform Application of the Federal Statute on Debt Collection.

Two conflicting interpretations of the Act have surfaced amongst the Circuit Courts. On one hand, the Ninth Circuit in *Pressley* held that a debt collector need not repeat the § 1692e(11) disclosure notice on follow-up correspondence sent to a debtor. The court reasoned that a strict, literal interpretation of the provision would be contrary to legislative intent and "plainly at variance with the policy of the legislation as a whole." *Id.* at 924 (quoting *U.S. v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940)). The Ninth Circuit determined that requiring collectors to place the § 1692e(11) disclosure on every single piece of correspondence sent to debtors would simply "ignore the balancing mandated by Congress." *Id.* at 925. "In fact," as the court warned, "there are some circumstances where the disclosures could become increasingly intimidating, contrary to the overall intent of the Act." *Id.*

The Federal Trade Commission, in its Proposed Official Staff Commentary, the only administrative interpretation of the FDCPA written to date, construed the Act in the same fashion. FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986). App. E.

On the other hand the Second Circuit in *Pipiles* and the Fourth Circuit in the instant case subsequently held that all debt collectors are required to strictly adhere to the § 1692e(11) disclosure requirements on all communications, even those occurring after the debtor has been repeatedly advised that the collector is attempting to collect a debt. Inexplicably, these courts refused to examine the comprehensive legislative history that surrounds the statute and simply applied a strict, literal interpretation of its language.

The significance of this conflict is magnified by the fact that the Ninth Circuit includes the most populous state in the Union (California) and the Second Circuit is inclusive of the second most populous state (New York). Thus, substantial numbers of attorneys and debt collectors are governed by different rules

depending on the jurisdiction in which they conduct debt collection activities.

a. Attorneys Across the Nation are Adversely Affected by the Conflicting Decisions.

The result of these contrary Circuit Court decisions coupled with the FTC Opinion significantly impacts upon the practice of law by the nation's attorneys, a result completely inconsistent with congressional intent in the passage of the FDCPA. Currently, over 12,474 law firms regularly engage in the practice of collection of debts.[4] MARTINDALE-HUBBELL LAW DIRECTORY (Lexis ed. 1992). Many are multi-state firms whose practices span state borders. In fact, 54,246 attorneys or 10.43% of all practitioners are associated with these multi-state firms.[5] AMERICAN LAW FOUNDATION, THE LAWYER STATISTICAL REPORT, 15, 21 (B. Curran 1991). Moreover, on an annual basis, nearly $70 billion worth of delinquent accounts are referred to law firms and collection agencies.[6] Levy, *Persuading People to Pay Bills During Hard Times*, N.Y. TIMES, Dec. 15, 1991 at F10 *citing* Amer. Collectors Ass'n. data.[7]

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[4]Moreover, 27,865 law firms in the United States identify themselves as practitioners of creditors rights. MARTINDALE-HUBBELL LAW DIRECTORY (Lexis ed. 1992).

[5]This number, however, is not even inclusive of the many attorneys who are members of multiple bars which are located in separate circuits.

[6]The magnitude is so large that the American Collectors Association estimates that bad debts cost each family in the U.S. approximately $1,000 in increased consumer prices annually. (figure derived from total dollars in bad debts divided by 66.1 million families in the U.S. in 1990. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 45 (1991)).

[7]The American Collectors Ass'n, whose approval of the FDCPA was instrumental in its passage, is a national organization representing over 3,500 of the nation's 6,000 collection agencies. *See* 123 CONG. REC. H10241 (daily ed.

Although the aforementioned statistics present a compelling reason for review by this Court, the adverse impact on the nation's attorneys of the conflicting decisions is best measured by the wide scope of legal actions to which courts have found the FDCPA applies.

For example, some attorneys have been found liable as debt collectors for handling collections on merely an "occasional basis." *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989) (citation omitted). Thus, attorneys filing just a handful of collection lawsuits per year (which many, if not most, do) are governed by the Act. Moreover, those associated with multi-state law firms face different requirements depending on where the debtor resides.[8]

Further, courts have held attorneys liable as debt collectors under the FDCPA in handling matters where legal counsel is customarily sought, such as foreclosure proceedings. *Id.* Thus, attorneys acting in their legal capacities are, in some jurisdictions, now obliged to place § 1692e(11) disclosure notices on all correspondence sent to party opponents (even after the initial communication).

The nationwide impact is substantial. According to the Mortgage Bankers Ass'n of America, there were 43,157,000 outstanding mortgages in the United States in 1989 (the last year for which figures are available). U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 509 (1991). Of those, 349,571 were involved in foreclosure actions. *Id.* Presumably, attorneys were intimately involved in a large majority of those cases for which the disclosure requirement would, in some

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April 4, 1977).

[8]For example, Petitioner practices in States comprising three separate federal circuits (the Third, Fourth and D.C. Circuits) and is exposed to numerous, conflicting interpretations of the Act depending upon where the debtor resides.

jurisdictions but not others, be mandatory.[9] This is but merely one example of the widespread effect the conflicting decisions have on recurrent legal procedures, resulting in widespread confusion among the nation's attorneys.

Indeed, the absurdity with a literal interpretation of the § 1692e(11) disclosure requirement is evidenced by the extraordinary steps attorney debt collectors may now have to undertake to ensure compliance with the Statute. Arguably, under the Fourth and Second Circuit rulings, attorneys may now have to include the disclosure notice on all lawsuits filed against debtors since they fall within the purview of "all communications." Notwithstanding the fact that litigation has commenced, under this expanded reading of the Act attorneys would be forced to place the disclosure notice on all legal documents including pleadings, interrogatories, writs of garnishment, liens of property, and even appellate briefs. Moreover, all personal contact with debtors including depositions, oral examinations and cross-examinations of debtors on the witness stand during trials would need to be preceded by a § 1692e(11) oral disclosure under this literal interpretation. All of this would be required under the Second and Fourth Circuit's expanded reading despite the fact that the communications are of a purely *legal* nature, well outside the contemplated scope of the Act.

Congress never intended such an overreaching interpretation and enforcement of the statute. The 1986 amendment repealing the attorney exemption was merely designed to level the playing field between attorney and non-attorney collectors. 131 CONG. REC. H10536 (daily ed. Dec. 2, 1985) (statements of Rep. Wylie). As Rep. Annunzio adamantly stated, "[t]he removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys." *Id.* at H10535. But a literal interpretation of the statute, void of all legislative intent and history, does just that. It significantly interferes with the practice of law by requiring untold numbers of disclosures on purely legal communications. In fact, it places non-attorney collectors on much

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[9]In fact, over 210,000 attorneys currently practice real estate law. MARTINDALE-HUBBELL LAW DIRECTORY (Lexis ed. 1992).

better footing then those who are members of the bar - a result Congress never intended.

Not only are over 50,000 attorneys acting in their legal capacities potentially affected by the conflicting decisions, but so are the 6,000 collection agencies that span the country employing over 48,800 people. N.Y. TIMES, *supra* at F10 (number of agencies). AMERICAN COLLECTION ASS'N, ANNUAL COMPOSITION SURVEY 1 (1989) (average number of debt collectors per agency - 8.14). Many are involved in multi-state collection efforts and, as is the case with attorneys, are exposed to conflicting interpretations of the FDCPA depending on where the debtor resides.[10]

Thus, the impact of these conflicting decisions is widespread and far-reaching. It affects attorneys handling just a few collection cases per year. It affects attorneys handling routine legal matters such as foreclosures. And it affects non-attorney debt collectors who must cope with the burden of being liable for non-disclosure in follow-up communications in some jurisdictions but not others. The end result is over 100,000 attorneys and debt collectors across the nation handling close to $70 billion of consumer debt who must vary their way of practicing law or doing business depending on which jurisdiction they contact a debtor in, a result completely at odds with Congressional intent.

b. Congress Intended a Uniform Application of the Statute.

In passing the FDCPA, Congress intended that the Act's provisions be applied on a uniform, nationwide basis and explicitly declared in the purpose clause that the Act was intended "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and *to promote consistent State action* to protect consumers against debt

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[10]In fact, some large collection agencies like Payco American, Inc. operate in all twelve federal circuits with over 40 offices, 2,500 employees and $125 million in revenue. N.Y. TIMES, *supra* at F10. BUS. WK., Jan 14, 1991 at 58.

collection abuses." 15 U.S.C. § 1692(e) (emphasis added). Indeed, while consistent application is the primary rationale behind passage of most federal statutes, it is especially important when it relates to legislation intended to regulate interstate commerce, as the FDCPA does.

On the floor of the Senate of the United States, Sen. Riegle, the chief sponsor, noted that the legislation was necessary because debt collection abuse was a "serious *national* problem." 123 CONG REC. S27386 (daily ed. Aug. 5, 1977) (emphasis added). He continued that debt collection was a "substantial business which touches the lives of many Americans." *Id.*

The U.S. House of Representatives echoed the same desire for uniform legislation. Rep. Annunzio, the author of the FDCPA, acutely noted that:

> [t]he ever-increasing geographical mobility of the citizens of our country results in the forwarding of accounts for collection from debt collectors in one State to debt collectors in other States. The advent of WATS telephone lines has made it economically feasible for debt collectors to operate by telephone on a *nationwide basis*. With an economy that spans the continent, a debt collector in one State frequently ends up collecting an account of a creditor located in a second State from a consumer who lives in a third State. 123 Cong. Rec. H10242 (daily ed. April 4, 1977) (emphasis added).

This accurate statement about the multi-state collection of debts illustrates the exact reason why uniformity is crucial to a proper application of the Act.

Finally, Rep. Wylie, the Consumer Affairs Subcommittee ranking minority member, in rationalizing federal intrusion into the collection of consumer debts added that "the reason is for standardization and *uniformity of conduct* in this area, if for nothing else." *Id.* at 10244 (emphasis added). He continued,

"from the standpoint of uniformity...I think this legislation is important." *Id.*

Prior to the passage of the FDCPA there were a host of conflicting, incomplete, unenforced state statutes regarding the collection of consumer debts. Further, states were powerless to enforce the widespread interstate collection of debts. The Senate Report on the legislation noted that 37 states had separate laws affecting nearly 200 million citizens. S. REP. NO. 382, 95th Cong., 1st Sess. 2, *reprinted in* 1977 U.S. CODE CONG. AND ADMIN. NEWS 1697. It also revealed that nearly 80 million U.S. citizens had either missing or ineffective coverage. Thus, the need for uniform, nationwide legislation.

In passing the FDCPA, Congress empowered a federal agency, the Federal Trade Commission, to both enforce the Act and construe it to ensure its nationwide interpretive consistency. 15 U.S.C. § 1692(l). Although the FTC's opinions of the Act are not binding on courts, they are, nonetheless, crucial to ensure uniformity of the Statute's application. Moreover, the Act provides for collector immunity for actions taken in good faith reliance on formal FTC advisory opinions. 15 U.S.C. § 1692k(e).

In 1986, the FTC issued a comprehensive interpretation of the FDCPA which included its enforcement position on the § 1692e(11) disclosure requirement. The federal agency determined that the disclosure need not be repeated on follow-up correspondence sent to debtors. FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986). App. E. That opinion confirmed and reinforced the uniform view prior to the 1986 amendment that "no purpose is served by requiring that every subsequent communication with (the) debtor contain [the § 1692e(11)] disclosures". *Pressley*, 760 F.2d at 925 (citation omitted). However, the FTC's reading of the § 1692e(11) provision, the only one to date, has since been completely ignored by two of the three Circuits.

Thus, not only are there conflicting federal Circuit Court of Appeals interpretations of the disclosure requirement, but two of those Circuits openly chose to reject the FTC's interpretation of the Act which remains the only *national* opinion setting forth

enforcement standards of the provision. In light of the failure of a consistent application and interpretation of the FDCPA, it is necessary that this Court undertake judicial review.

2. The Fourth Circuit Committed a Significant Error by Failing to Examine the Comprehensive Legislative History that Surrounds the FDCPA and Failing to Correctly Apply the Re-Enactment Rule.

a. The Fourth Circuit's Decision is Plainly at Variance with the Legislative Intent of the FDCPA.

The FDCPA was passed by Congress in 1977 in response to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices." 15 U.S.C. § 1692(a). Throughout the legislative findings there is a keen focus on unscrupulous conduct by some collectors.

Although there is a lack of legislative history specifically focusing on § 1692e(11), a plethora of evidence exists as to the overall intent of the statute as a whole. An examination of the record reveals that the FDCPA was enacted to "protect consumers from a host of unfair, harassing and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." 123 CONG. REC. S27386 (daily ed. Aug. 5, 1977) (statement of Sen. Riegle). The intent written into the statute as well as its legislative history are plainly at variance with a literal interpretation of § 1692e(11) which would impose an unnecessary, inflexible rule on attorneys and debt collectors.

The Ninth Circuit appropriately found that a literal reading of § 1692e(11), which would require a debt collector to make affirmative disclosures in follow-up collection notices and telephone calls that the communication was for the purpose of collecting a debt and that information obtained would be used for that purpose, would "ignore the balancing mandated by Congress." *Pressley*, 760 F.2d at 925. In reaching this determination, the Ninth Circuit applied the reasoning of several decisions of this Court which hold that the legislative intent is not always evident

from the plain language of a statute and that the courts must look to the legislative history for guidance. *See*, e.g. *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979); *Philbrook v. Glodgett*, 421 U.S. 707 (1975).

Thus, the Fourth Circuit, by failing to look beyond the literal language of the FDCPA, committed an error which must be reviewed by this Court.

b. The Fourth Circuit Incorrectly Applied the Re-Enactment Rule.

The FDCPA originally exempted "an attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client" from the definition of debt collectors subject to regulation by the Statute, but Congress amended the Act deleting this exemption on July 9, 1986. Pub. L. No. 99-361 (1986) [deleting 15 U.S.C. § 1692a(6)(F)].

Prior to the 1986 amendment repealing the attorney exemption, there were two (2) consistent judicial and administrative interpretations that a debt collector need not repeat the § 1692e(11) disclosure in a follow-up letter. Both the Ninth Circuit in *Pressley* and the Federal Trade Commission identically agreed that "the debt collector need not repeat the required disclosure in subsequent contacts." FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986).

By repealing the attorney exemption, which in effect amended the statute by significantly expanding the definition of a debt collector, Congress incorporated the consistent prior judicial and administrative interpretations of § 1692e(11) into the Act. *See*, e.g. *Bridges v. U.S.*, 346 U.S. 209 (1955) (holding that an amendment to a statute incorporates all prior judicial decisions); *Lorrilard v. Pons*, 434 U.S. 575 (1978) (holding that Circuit Court interpretations of a statute are incorporated into identical language appearing in a subsequent statute); *FHA v. Darlington*, 358 U.S. 84 (1958) (holding that prior administrative decisions are likewise incorporated into a statute upon its re-enactment). Accordingly, in the instant case the Fourth Circuit was bound by those

interpretations and was in error when it held that "[w]hile it is true that re-enactment of statutory provisions generally incorporate administrative or judicial decisions, this Act was not re-enacted - rather, part of it was repealed." App. A, *infra*, A5.

The application of this doctrine is not limited to a literal re-enactment of a statute as the Fourth Circuit incorrectly stated. An amendment to a statute acts in the same fashion as a literal re-enactment, and unless a contrary intent is clearly indicated, the amended statute is regarded as if the original statute had been repealed and the whole statute re-enacted with the amendment. 23 AM. JUR. 2D *Statutes* § 343 (1983 & Supp. 1992). Indeed, "[w]here a statute repeals and supplants a former act in which a certain phrase had been judicially construed, it will be presumed that the legislature intended the same construction to be given to the same phrase used in the title and body of the repealing act." 82 C.J.S. STATUTES § 386 (1953 & Supp. 1991).

Therefore, the Fourth Circuit committed error by refusing to recognize the consistent judicial and administrative interpretations of § 1692e(11), which held that the disclosure need not be repeated in follow-up communications with debtors, prior to the Act's amendment in 1986 . These consistent rulings were incorporated into the Act under the re-enactment rule.

CONCLUSION

The petition for writ of certiorari should be granted in order to resolve the conflict between the circuits and correct the erroneous decision rendered by the U.S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

RONALD S. CANTER*
7272 Wisconsin Avenue
4th Floor
Bethesda MD 20814-4838
(301) 951-8500
Counsel for Petitioner

* Counsel of Record

June 24, 1992

APPENDIX

Appendix A

FILED
MARCH 30, 1992
JOHN M. GREACEN, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN J. CARROLL,

Plaintiff-Appellant,

v.

No. 91-2201

WOLPOFF & ABRAMSON,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-91-1297-S)

Argued: February 5, 1992

Decided: March 30, 1992

Before SPROUSE, WILKINSON, and WILKINS, Circuit Judges.

Reversed and remanded by published opinion. Judge Sprouse wrote the opinion, in which Judge Wilkinson and Judge Wilkins joined.

COUNSEL

ARGUED: Andrea Goodwin Green, UAW LEGAL SERVICES PLAN, Newark, Delaware, for Appellant. Ronald Scott Canter, Bethesda, Maryland, for Appellee. **ON BRIEF:** O. Randolph Bragg, UAW LEGAL SERVICES PLAN, Newark, Delaware, for Appellant.

OPINION

SPROUSE, Circuit Judge:

Susan Carroll appeals the district court's grant of summary judgment to the law firm of Wolpoff and Abramson on her claim that the firm, acting as collection agents for a creditor, violated the Fair Debt Collection Practices Act,[1] specifically, 15 U.S.C. § 1692e(11). The law firm's first collection letter to Carroll included the information required by section 1692e(11), but its follow-up letter did not. The district court, holding that a collection agency's follow-up notice need not comply with section 1692e(11), granted summary judgment to the law firm.[2] We disagree and reverse.

Macy's Northeast, Inc., retained the law firm of Wolpoff and Abramson to collect $1,841.11 owed by Susan Carroll to the department store. Wolpoff and Abramson brought suit on the debt in Maryland state court after Carroll failed to respond to its two collection letters. During the bench trial, Carroll admitted owing the debt and judgment was entered against her in May of 1990. On June 11, 1990, the law firm wrote Carroll, stating: "Your past due account is in our office for legal action. It is imperative that you contact us immediately if you wish to make arrangements to pay this debt prior to additional litigation." Carroll did not respond to this letter and later filed for bankruptcy.

On May 10, 1991, Carroll sued Wolpoff and Abramson alleging, among other things, that the June 11, 1990, letter violated

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[1]15 U.S.C. §§ 1692-1692o.

[2]The district court also granted summary judgment to the law firm on Carroll's claims that the letter was misleading in violation of 15 U.S.C. § 1692e(10) and that the law firm failed to send a notice of debt in violation of 15 U.S.C. § 1692g. These issues are not raised on appeal.

section 1692e(11) of the Fair Debt Collection Practices Act because it failed to include a warning that the letter was an attempt to collect a debt and that any information obtained would be used for that purpose.[3] Although the district court noted that the letter failed to comply with the requirements of section 1692e(11), it granted summary judgment to the law firm ruling that a follow-up letter need not comply with these requirements. We disagree.

In 1977, Congress enacted the Fair Debt Collection Practices Act to eliminate abusive debt collection practices. *See* 15 U.S.C. § 1692a,e. *See also Miller v. Payco-General American Credits*, 943 F.2d 482, 483-84 (4th Cir. 1991). Section 1692e states, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ...
>
> (11) . . . the failure to disclose clearly in *all communications* made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

15 U.S.C. § 1692e (emphasis added). In our view, the language "all communications" in section 1692e(11) is clear and unambiguous. It makes no distinction between initial and subsequent communications.

Although Wolpoff and Abramson do not dispute the clarity of the Act's language, they argue that congressional intent in

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[3]Carroll sought actual damages and statutory damages of $1,000 pursuant to 15 U.S.C. § 1692k.

preventing the abuse of debtors will not be furthered by requiring the disclosure requirements of section 1692e(11) in follow-up letters. We simply disagree. Consumers sometimes do not receive first notices, and thus, follow-up letters may often provide them with their first notice of the debt collection process. In our view, it follows that requiring the disclosure requirements of section 1692e(11) in follow-up letters furthers congressional intent to prevent the abuse of debtors. Although the equities here are one step removed because a judgment on the debt preceded the follow-up letter at issue, there is still a possibility of over-reaching by creditors. "Congress [may] exercise its legislative judgment to adopt a reasonable margin of safety to insure its remedial goal." *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989).

We recognize that the Ninth Circuit in *Pressley v. Capital Credit & Collection Service, Inc.*, 760 F.2d 922, 925 (9th Cir. 1985), relying upon a statement by Senator Riegle (Michigan) during committee debate, held that follow-up notices need not comply with the disclosure requirements of 15 U.S.C. § 1692e(11).[4] We cannot agree with the reasoning in *Pressley*. Senator Riegle's statement was to the effect that the purpose of the Act was to protect consumers without unnecessarily restricting ethical collectors. The *Pressley* court reasoned that in balancing two congressional objectives implicit in that statement, the disclosure requirements of section 1692e(11) need not be included in follow-up letters. The court in *Pipiles* correctly reasoned that such an interpretive analysis based in the remarks of one senator was strained and that the end result would be to change the clear and unambiguous language of "all communications" to "some

---

[4]The *Pressley* court also relied upon informal advisory opinions of the Federal Trade Commission that the debt collector need not repeat the required disclosure in subsequent letters. Wolpoff and Abramson point out the FTC's position. We find the position of the FTC unpersuasive and it is well-settled that we "need not defer to an agency's construction of its governing statute if the construction violates an unambiguous statutory command..." *Mowbray v. Kozlowski*, 914 F.2d 593, 598 (4th Cir. 1990).

communications." *Id.* at 27.

Finally, Wolpoff and Abramson argue that the 1986 amendment to the Act repealing the attorney exemption, previously codified at section 1692a(6)(F), incorporated the *Pressley* decision as well as prior administrative interpretations of the Act. We cannot agree. While it is true that re-enactment of statutory provisions generally incorporate administrative or judicial decisions, this Act was not re-enacted-- rather, part of it was repealed.

Accordingly, we reverse the district court's grant of summary judgment and remand the case for further proceedings.

REVERSED AND REMANDED

Appendix B

FILED
JULY 23, 1991
CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN CARROLL	*	
	*	
v.	*	Civil No. S 91-1297
	*	
WOLPOFF & ABRAMSON	*	
	*	

* * * * * * * * *

MEMORANDUM OPINION

This case, filed under the Fair Debt Collection Practices Act, and which has itself generated a considerable amount of paper, in the forms of pleadings and motions, stems from a two-sentence, four-line letter, dated June 11, 1990, sent by the defendant, a law firm, to the plaintiff, a consumer, concerning a judgment debt arising from a lawsuit brought against her by Macy's after she failed to pay for a ring. (Plaintiff appeared at the state district court proceedings which resulted in the judgment that was the subject of the June 11 letter, testifying that there was nothing wrong with the ring, and that she had no reason not to pay for it, except that she could no longer afford to and was hoping that Macy's would take it back. Not surprisingly, judgment was entered against her. *See* Transcript of proceedings before Judge Sisk, District Court of Maryland No. 3-2, Case No. CV121-90, May 30, 1990, filed in support of defendant's summary judgment motion.)

The case is now pending on cross-motions for partial and full summary judgment. No oral argument is needed.

It is plain that the defendant is subject to the Act in question and that the letter at issue fails to comply with the notice requirements of 15 U.S.C. §1692e(11). There is a split of authority in the circuits on the applicability of that statute to follow-on letters, after the ini' ' contact letter. (Whether or not plaintiff recalls receiving prior correspondence on this debt, there is no genuine dispute that the June 11 letter was not the first letter *sent* to plaintiff by defendant over the Macy's debt. The Fair Debt, etc., Act's focus is on the content of correspondence sent by the defendant, not on the plaintiff's receipt of it, and, thus, it is immaterial whether she actually received prior correspondence.) The Ninth Circuit has held that the notice requirements of the statute do not apply to follow-on correspondence, *Pressley v. Capital Credit & Collection Serv., Inc.*, 760 F.2d 922 (9th Cir. 1985) (per curiam), while the Second Circuit has recently held the opposite, expressly rejecting *Pressley*. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 26-27 (2d Cir. 1989). Faced with these conflicting cases, this Court holds that common sense is better served by the following *Pressley* than *Pipiles*. Although Congress used language in the statute that seems to extend the notice requirement to every piece of correspondence over a debt, literal application of that language to a case like this, where the plaintiff well knew about the debt, having only days earlier appeared in court to have a judgment entered against her on it, simply makes no sense and serves no useful purpose. *Pressley*, 760 F.2d at 926. Thus, summary judgment will be awarded to the defendant as to the claim of violation of §1692e(11).

The Court next holds, as a matter of law, that the letter of June 11 was not misleading under §1692e(10). The major language of the letter that is claimed to be misleading to the "least sophisticated consumer," *see Jeter v. Credit Bureau, Inc.*, 760 F.2d 1163, 1177-78 (11th Cir. 1985) is the statement that "It is imperative that you contact us immediately if you wish to make arrangements to pay this debt prior to additional litigation."

Certainly, telling the consumer that she must contact the debt collector if she *wishes* to make arrangements to pay off the debt does not force or coerce such contact, or otherwise mislead anyone. The alleged misleading pointed to by plaintiff in her summary judgment and reply memoranda is the mention of "additional litigation," (preceded by mention that her Macy's account was overdue and in defendant's office for legal action.) Given that the law of Maryland indisputably provides, and has always provided, for post-judgment proceedings such as discovery in aid of enforcement, *see* Maryland Rule 2-632 (which are certainly litigation in any sense of the word, even to the least sophisticated person), there is nothing misleading about telling the debtor to contact the attorney if she wishes to pay off the debt without going through post-judgment proceedings. A statement of this sort need not enumerate the proceedings and/or explain them in order not be misleading. Nor could even the least sophisticated consumer be misled by reference to a past due account which she not only knew to be past due but to have been reduced to judgment in her presence, and the obvious subject of legal action, given the law firm letterhead on which the letter was sent. Because no reasonable fact-finder could find the communication here to be misleading, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), summary judgment will be granted to the defendant on the claim under §1692e(10).

Finally, given the evidence that defendant has brought forth of its practices and procedures as to 16 U.S.C. §1692g as to the sending of proper notices pre-litigation, the plaintiff's affidavit that she cannot recall having received such letters is insufficient to generate a genuine dispute of fact that they were sent; plaintiff's mere failure of recollection of receipt of the letters would not justify a reasonable fact-finder, were the case at directed verdict, in finding that the letters were not sent in the first place, given the evidence brought forward by defendant. The statute does not require that the debtor receive conforming notices, but only that the collector send them. Furthermore, the affidavits submitted by defendant, unrefuted by plaintiff save, perhaps, for her failure of recollection, establish beyond doubt that the defendant has

established procedures reasonably adapted to avoid any errors in the form of omitted §1692g notice on initial contact, thus entitling it to the statutory defense stated in §1692k(c).

For the reasons stated, an order will be entered separately, denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment.

Dated: JULY 23, 1991

FREDERIC N. SMALKIN
FREDERIC N. SMALKIN
U.S. District Judge

Appendix C

FILED
JULY 23, 1991
CLERK, U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SUSAN CARROLL	*	
	*	
v.	*	Civil No. S 91-1297
	*	
WOLPOFF & ABRAMSON	*	
	*	

* * * * * * * * *

ORDER AND JUDGMENT

For the reasons stated in a Memorandum Opinion entered herein this date, it is, this 23RD day of JULY, 1991, by the Court, ORDERED and ADJUDGED:

1. That the plaintiff's Motion for Partial Summary Judgment BE, and the same hereby IS, DENIED;

2. That the defendant's Motion for Summary Judgment BE, and the same hereby IS, GRANTED;

3. That judgment BE, and it is hereby IS, entered for the defendant and against the plaintiff, with costs; and

4. That the Clerk mail copies hereof and of the foregoing Memorandum to counsel.

FREDERIC N. SMALKIN
FREDERIC N. SMALKIN
U.S. District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Susan J. Carroll,	*	
Plaintiff,	*	
vs.	*	Civil Action No. S91-1297
Wolpoff & Abramson,	*	
Defendant.	*	

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The undersigned, Barry E. Gordon, hereby declares and affirms under the penalties of perjury that he has personal knowledge of the facts set forth herein and that he is competent to testify thereto:

1. That I am an attorney licensed to practice law in the State of Maryland.

2. That I am a partner in the law firm of Wolpoff & Abramson.

3. Since I became associated with Wolpoff & Abramson in 1971, I have supervised the filing of lawsuits for our debt collection clients in the District Court of Maryland.

4. That records concerning our pre-litigation debt collection efforts are entered and maintained in our computer system. Once suit is filed, a paper file is created which contains a copy of the lawsuit and all pleadings.

5. That I have reviewed the records in our computer and in our paper file pertaining to our collection efforts and subsequent litigation against the Plaintiff in this case.

6. That on August 9, 1989, our initial collection letter was automatically generated by our computer and was mailed to the Plaintiff, (then known as Susan Miller) at 1732 Montgomery Road, Wilmington, Delaware 19805 demanding payment on Plaintiff's delinquent Macy's account. This letter was never returned to Wolpoff & Abramson.

7. We do not retain a copy of the initial collection letter which our office sends to each debtor. Instead, a notation is made on our computer system that the collection letter has been mailed.

8. Attached hereto and incorporated by reference as Exhibit A is a facsimile reproduction obtained from our computer of the collection letter that was sent to the Plaintiff on August 9, 1989. This initial collection letter, which is automatically generated by our computer and mailed to each debtor, was revised upon the repeal of the attorney exemption to the Fair Debt Collection Practices Act in 1986. Since 1986, this letter and all first letters to debtors have contained all disclosures required by Sections 1692g and 1692e(11) of that Act. The last sentence of the disclosure states "this is an attempt to collect a debt and any information will be used for that purpose" which is the exact language required by Section 1692e(11).

9. The Plaintiff did not contact our office in response to the August 9, 1989 collection letter, nor was payment received on her account with Macy's.

10. That our office was notified of the Plaintiff's change of address and on November 11, 1989, in order to insure that she received the required notice, another collection letter containing the Fair Debt Collection Practices Act notices (Exhibit

A) was sent to the Plaintiff at 206 Hollingsworth Manor, Elkton, MD 21921.

11. When no response was received to our November 11, 1989 letter, we filed suit in the District Court for Cecil County, Maryland against the Plaintiff on January 18, 1990. (Case No. 90-121). The suit named Susan J. Miller as the Defendant, as that was the name under which she had established her account with our client, Macy's Northeast, Inc. The suit was filed with an affidavit verifying the balance due and requested entry of judgment on the affidavit under Maryland Rule 3-306.

12. Our office was advised that the initial Summons and Complaint was returned non-est by the Sheriff on February 27, 1990.

13. Thereafter, we reissued the Summons and Complaint for service by certified mail. The reissued summons notified the Plaintiff herein that unless she filed a notice of intention to defend, that Macy's request for judgment on the affidavit would be considered by the Court on May 30, 1990.

14. That on June 4, 1990, our office received a copy of the attached judgment and docket entries entered by the District Court for Cecil County, Maryland on May 30, 1990. A certified copy of the judgment, docket entries and papers contained in the Court file is attached as Exhibit B.

15. That the docket entries to this judgment reflect that on May 30, 1990 the Defendant in that case (Plaintiff herein) personally appeared in Court without filing a notice of intention to defend and consented to the entry of a judgment against her.

16. That the docket entries further reveal that the Clerk mailed a notice of judgment on May 31, 1990 to the Plaintiff herein. Attached hereto and incorporated by reference as Exhibit C is a copy of the notice of judgment which was mailed by the Clerk of the Court to all judgment debtors pursuant to the

provisions of Maryland Rule 3-306 and Maryland Rule 3-601 as of May, 1990.

17. That after receiving a copy of the judgment, our office attempted to locate attachable assets of the Plaintiff in order to satisfy the judgment. Our efforts included a review of the credit references from our client and a review of the information which was in our file. We also sent the Defendant the June 11 letter attached to the Complaint as Exhibit A.

18. We were unsuccessful in locating attachable assets of the Plaintiff and advised our client on August 4, 1990 that we had placed the Plaintiff's judgment file in an inactive status pending additional information as to the Plaintiff's assets.

19. That on February 20, 1991, our office received a copy of the enclosed notice from United States Bankruptcy Court for the District of Maryland indicating that the Plaintiff, Susan Joy Miller a/k/a Susan Joy Carroll, filed a petition in bankruptcy on February 4, 1991.

20. Our office had no communication with the Plaintiff herein after the June 11, 1990 letter.

BARRY E. GORDON
Barry E. Gordon

Subscribed and sworn to before me this 30TH day of

MAY, 1991.

CHRISTINE WILTSHIRE
Notary Public

My Commission Expires: JUNE 1, 1995

Appendix E

Federal Trade Commission Proposed Official Staff Commentary

Section 807(11) requires the debt collector to "disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," except where §804 provides otherwise.

1. *Oral Communications.* A debt collector must make the required disclosures in both oral and written communications.

2. *Disclosures to Consumers.* When a debt collector contacts a consumer and clearly discloses that he is seeking payment of a debt, he need not state that all information will be used to collect a debt, since that should be apparent to the consumer. The debt collector need not repeat the required disclosure in subsequent contacts.

A debt collector may not send the consumer a note saying only "please call me right away" unless there has been prior contact between the parties and the collector is thus known to the consumer.

3. *Disclosures to Third Parties.* The debt collector must state in his first communication with a third party that he is attempting to collect the debt and that information will be used for that purpose, but need not do so in subsequent communications with that party.

Appendix F

STATUTE INVOLVED

15 U.S.C. § 1692e. False or misleading representations.

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following contact is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of --

(A) the character, amount or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to --

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) Except as otherwise provided for communications to acquire location information under section 1692b of this title, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 91-2057

In The

Supreme Court of the United States

October Term, 1992

WOLPOFF & ABRAMSON,

Petitioner,

vs.

SUSAN CARROLL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ANDREA G. GREEN
Counsel of Record
O. RANDOLPH BRAGG
Attorneys for Respondent
UAW Legal Services Plan
200 Continental Drive
Suite 212
Newark, Delaware 19713
(302) 366-0513

QUESTIONS PRESENTED FOR REVIEW

Whether the Fourth Circuit correctly found that the Fair Debt Collection Practices Act requires that all communications made to collect a debt or to obtain information about a consumer, both initial and subsequent, contain the debt collection warning required by 15 U.S.C. § 1692e(11) that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

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APPENDIX

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No. 91-2057

In The

Supreme Court of the United States

October Term, 1992

WOLPOFF & ABRAMSON,

Petitioner,

vs.

SUSAN CARROLL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals has now been reported as *Carroll v. Wolpoff & Abramson,* 961 F.2d 459 (4th Cir. 1992). A copy of the District Court opinion, which was not reported, is attached to the Petition for a Writ of Certiorari at App. B.

STATEMENT OF THE CASE

On June 11, 1990 Wolpoff & Abramson, a law firm, sent a collection letter to Susan Carroll (App. A, *infra*, 1a). Susan Carroll is a "consumer" within the meaning of the definition contained in the Fair Debt Collection Practices Act (hereinafter FDCPA or the Act), 15 U.S.C. § 1692a(3), and Wolpoff & Abramson is a "debt collector" under the terms of 15 U.S.C. § 1692a(6). Wolpoff & Abramson maintains that it sent other correspondence regarding the same account to Susan Carroll prior to the June 11, 1990 letter. The June 11 letter does not contain the disclosure required by the FDCPA at 15 U.S.C. § 1692e(11). The Act states:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> > (11) Except as otherwise provided for communications to acquire location information under section 804, the failure to disclose clearly in all communications made to collect a debt or obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

15 U.S.C. § 1692e.

Susan Carroll filed her Complaint in the United States District Court for the District of Maryland on May 10, 1991 alleging

violations of the FDCPA, one of which was violation of 15 U.S.C. § 1692e(11).

Cross-motions for summary judgment were filed and on July 30, 1991 the District Court denied plaintiff's motion, granted defendant's motion and issued a Memorandum Opinion, a copy of which is reprinted as App. B in Wolpoff & Abramson's Petition for a Writ of Certiorari. The District Court noted that the Ninth Circuit in *Pressley v. Capital Credit and Collection Service, Inc.*, 760 F.2d 922 (9th Cir. 1985), had ruled that follow-up communications need not contain the required notice while the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), expressly rejected *Pressley* and found that all communications must contain this disclosure. The District Court declined to make a literal application of the statutory langauge and followed *Pressley*.

The Fourth Circuit reversed finding the plain language of the statute "clear and unambiguous." *Carroll v. Wolpoff & Abramson, supra* at 461.

SUMMARY OF ARGUMENT

The Fourth Circuit correctly found that Wolpoff & Abramson violated the FDCPA requirement that all communications must contain the 15 U.S.C. § 1692e(11) debt collection warning. While this opinion conflicts with the Ninth Circuit's opinion in *Pressley v. Capital Credit and Collection Services, Inc.*, 760 F.2d 922 (9th Cir. 1985), it is entirely consistent with the Second Circuit's opinion in *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989) and with every other decision, both reported and unreported, construing this statutory section.

Wolpoff & Abramson vastly overstates the effect of the Fourth Circuit's holding. The statutory provision at issue is easily

satisfied by the inclusion of the phrases in every communication from a debt collector to an alleged debtor. Despite Wolpoff & Abramson's contention to the contrary, there is no "profound impact on the practice of law." (Petition for a Writ of Certiorari at p. 5).

Wolpoff & Abramson's reliance on the FTC Proposed Official Staff Commentary, 51 Fed. Reg. 8019 (March 7, 1986) is entirely misplaced. The Commentary is non-binding and squarely conflicts with the statutory language.

Finally, Wolpoff & Abramson incorrectly asserts that the Fourth Circuit "completely disregarded two opinions which were incorporated into the Act through congressional re-enactment of the statute." (Petition for a Writ of Certiorari at p. 5). In fact, the Fourth Circuit considered the proposed Staff Commentary and the Ninth Circuit opinion in *Pressley, supra*, and, for very specific reasons, declined to follow them.

REASONS FOR DENYING THE WRIT

I.

The Fourth Circuit's decision does not significantly impact on the practice of law.

The Fourth Circuit has held that the FDCPA, pursuant to 15 U.S.C. § 1692e(11), requires that *all communications* (emphasis added) made to collect a debt or obtain information about a consumer contain the warning that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. *Carroll v. Wolpoff & Abramson, supra* at 461. In so holding, the court has enforced the exact statutory language.

Wolpoff & Abramson maintains that the Fourth Circuit's

ruling significantly impacts upon the practice of law. It intimates that the Fourth Circuit's opinion may require the Section 1692e(11) disclosure in legal documents such as complaints, interrogatories, execution and other pleadings (Petition for a Writ of Certiorari at p. 9). Such an interpretation goes well beyond the scope of the Fourth Circuit's holding. There is no question that the June 11, 1990 letter sent to Susan Carroll by Wolpoff & Abramson, the only communication at issue in this case, constituted a "communication" under the terms of the FDCPA. 15 U.S.C. § 1692a(2). It is also undisputed that the letter failed to contain the § 1692e(11) debt collection warning. The communication sent was not a pleading, interrogatory, writ of garnishment, notification of lien on property, or an appellate brief. Nor was it an item of correspondence required to be sent under any statute prior to a proceeding executing on a debt. Wolpoff & Abramson effectively is asking this Court to review the Fourth Circuit's opinion due to their fear of an expansion of this opinion in later litigation. The Fourth Circuit was not called upon to, and did not, consider the statutory section's application to pleadings and other legal documents. As the Fourth Circuit did not reach that issue, there is no need for this Court to consider it.

Compliance with the statute and with the Fourth Circuit's opinion is simple. A collector, whether attorney or non-attorney[1], need only include the § 1692e(11) debt collection warning in all communications. There is no question that initial communications with consumer debtors must contain the § 1692e(11) notice. *Emanuel v. American Credit Exchange,* 870 F.2d 805 (2d Cir. 1989); *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037 (8th Cir. 1984). Wolpoff & Abramson acknowledges that its two earlier letters, dated August 9 and November 11, 1989, to Susan

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1. Wolpoff & Abramson's assertion that requiring the disclosure in all communications gives some advantage to non-attorneys (Petition for a Writ of Certiorari, pp. 9-10) is entirely unsupported.

Miller contained the collection warning required by 15 U.S.C. § 1692e(11) (App. D to Petition for a Writ of Certiorari, D-2).

Wolpoff & Abramson and all other collectors, whether attorney or non-attorney, need only add the debt collection warning to subsequent communications to comply with 15 U.S.C. § 1692e(11). Including the warning in follow-up communications would not present a creditor with a problem in the Ninth Circuit. Compliance with *Pipiles* and *Carroll* as to § 1692e(11) would presumably satisfy all Circuits. The existence of the conflict therefore presents no real problem for collectors, regardless of the jurisdictions in which they operate.

Except for the Ninth Circuit in *Pressley v. Capital Credit & Collection Services, Inc.*, 760 F.2d 922 (9th Cir. 1985), all courts addressing this issue have required the provision of the debt collection warning pursuant to 15 U.S.C. § 1692e(11). *Carroll v. Wolpoff & Abramson, supra; Pipiles v. Credit Bureau of Lockport, Inc., supra; Hulshizer v. Global Credit Services, Inc., supra; Wollfolk v. Van Ru Credit Corp.*, 783 F. Supp. 724 (D. Conn. 1990); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990); *Young v. Credit Bureau of Lockport, Inc.*, 729 F. Supp. 1421 (W.D.N.Y. 1989); and *Seabrook v. Onondaga Bureau of Medical Economics, Inc.*, 705 F. Supp. 81 (N.D.N.Y. 1989).

The Ninth Circuit in its *Pressley* decision held that "the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692e(11) must be made." *Supra* at 825. This holding redefines the term "communication" and distorts the meaning which is defined in the Fair Debt Collection Practices Act as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). The Second Circuit in the *Pipiles* decision and the Fourth Circuit in the *Carroll* decision would not reach such a result and applied the "clear and unambiguous"

language of the statute to require the debt collection warning of § 1692e(11) to be disclosed in all communications.

II.

Wolpoff & Abramson's reliance on the proposed Commentary is misplaced and misleading.

In addition to relying upon the Ninth Circuit's opinion in *Pressley v. Capital Credit and Collection Services, Inc., supra,* Wolpoff & Abramson criticize the Fourth Circuit for failing to follow the Federal Trade Commission's Proposed Official Staff Commentary. Wolpoff & Abramson have incorrectly focused upon the "proposed" FTC Official Staff Commentary on the Fair Debt Collection Practices Act. The Commentary is no longer "proposed" and is published at 53 Fed. Reg. 50097-50110 (December 13, 1988). Both the Commentary and the Proposed Commentary as it relates to § 1692e(11) (reprinted at App. E of the Petition for a Writ of Certiorari) state that the notice is required only in initial communications. The FDCPA however, explicitly prohibits the promulgation of trade regulation rules or other regulations under the Act. 15 U.S.C. § 16921(d). Both the statutory enactment and the legislative history make it abundantly clear that the legislation was comprehensive and self-enforcing. S. Rep. No. 382, 95th Cong. 1st Sess. 5, 6 (1977).

The FTC recognized this limitation and stated in the introduction to its Official Staff Commentary on the Fair Debt Collection Practices Act:

> This Commentary is the vehicle by which the staff of the Federal Trade Commission publishes its interpretations of the Fair Debt Collection Practices Act (FDCPA). It is a guideline intended to clarify the staff interpretations to the statute,

> but does not have the force or effect of statutory provisions. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public.

53 Fed. Reg. 50097-50110, at 50101 (December 19, 1988).

The proposed Commentary was prepared as a compilation of and replacement for staff opinion letters previously issued by the FTC. These letters are not binding on the FTC, let alone the courts. *Scott v. Jones*, ____ F.2d ____ (4th Cir. 1992); *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980). The proposed Commentary therefore should be accorded little weight. In an earlier decision, similar to the one presented here, the debt collector relied upon a staff letter from an attorney in the Division of Credit Practices for the Federal Trade Commission and argued that the violation of the FDCPA was unintentional. The Eighth Circuit ruled that the collector's reliance thereon was in conflict with the "clear language" of the statute. The "unambiguous" language of 15 U.S.C. § 1692e(11) required the debt collection warning be provided to the consumer. *Hulshizer v. Global Credit Services, Inc., supra* at 1038.

Wolpoff & Abramson misleads the Court by referring to collector immunity allowed under 15 U.S.C. § 1692k(e) for reliance on formal FTC advisory opinions (Petition for a Writ of Certiorari at p. 12). The Commentary is not a formal advisory opinion and reliance would not provide a "good faith" defense. In fact, no formal opinions on the FDCPA have issued from the Federal Trade Commission.

Further, the Fourth Circuit clearly considered the FTC's position and rejected it, *Carroll v. Wolpoff & Abramson, supra* at 461, n.4, citing *Mowbray v. Kozlowski*, 914 F.2d 593 (4th Cir. 1990), due to its conflict with the clear and unambiguous statutory language.

III.

The doctrine of legislative re-enactment does not mandate a finding contrary to that of the Fourth Circuit.

In 1986 Congress amended the FDCPA by deleting the former exception of attorneys from the definition of debt collectors. Pub. L. No. 99-361 (1986), 100 Stat. 768. Wolpoff & Abramson incorrectly maintains that the existence of the FTC Proposed Commentary on § 1692e(11) and the Ninth Circuit opinion in *Pressley* at the time of the amendment require a finding consistent with those interpretations. However, when statutory language "is unambiguous and the regulation clearly inconsistent with it," *Mass. Mutual Life Ins. Co. v. U.S.*, 288 U.S. 269, 273 (1933), the regulatory language will not carry over in a re-enactment. *See also, Louisville and N.R. Co. v. United States*, 282 U.S. 740, 759 (1931).

The Fourth Circuit considered Wolpoff & Abramson's argument of the doctrine of legislative re-enactment but followed the analysis articulated by the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.*, *supra*. *Carroll v. Wolpoff & Abramson*, *supra* at 461. Therein, the *Pipiles* Court stated:

> "The starting point for our interpretation of a statute is always its language." *Mobil Oil Corp. v. Karbowski*, 879 F.2d 1052, 1054 (2d Cir. 1989) (quoting *Community for Creative Non-Violence v. Reid*, ____ U.S. ____, 109 S. Ct. 2166, 2172 (104 L. Ed. 2d 811 (1989)). "Thus, '[a]bsent a clearly expressed legislative intention to the contrary, [the language used] must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980).

Pipiles v. Credit Bureau of Lockport, Inc., supra at 26. The Second Circuit then rejected the holding of the *Pressley* Court and held that the debt collection warning of 15 U.S.C. § 1692e(11) was required in all communications.

Contrary to Wolpoff & Abramson's position, the doctrine of legislative re-enactment is not applicable to this case.

IV.

Wolpoff & Abramson incorrectly asserts that the Fourth Circuit failed to consider the legislative history of the FDCPA.

Wolpoff & Abramson asserts that the Fourth Circuit failed to look to legislative intent. The Fourth Circuit's opinion refers to its earlier decision in *Miller v. Payco-General American Credits,* 943 F.2d 482 (4th Cir. 1991), in which legislative intent and history of the Act are discussed. The Fourth Circuit also considered the purpose of the debt collection warning in its opinion below. *Supra* at 461. It approved the rationale of the Second Circuit in *Pipiles v. Credit Bureau of Lockport, Inc.,* which stated: "Congress [may] exercise its legislative judgment to adopt a reasonable margin of safety to insure its remedial goal." *Supra* at 27. Further, the Fourth Circuit considered the reasoning of the Ninth Circuit in *Pressley v. Capital Credit and Collection Service, Inc., supra,* particularly its analysis of the legislative history, and rejected it. Again citing *Pipiles,* the Fourth Circuit stated that the *Pressley* analysis "based in the remarks of one senator was strained" and effectively would work a change in the express statutory language. *Id.* at 461.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: July 21, 1992

Respectfully submitted,

ANDREA G. GREEN
Counsel of Record
O. RANDOLPH BRAGG
Attorneys for Respondent
UAW Legal Services Plan
200 Continental Drive
Suite 212
Newark, Delaware 19713
(302) 366-0513

APPENDIX A — LETTER OF JUNE 11, 1990

LAW OFFICES
WOLPOFF AND ABRAMSON
11140 ROCKVILLE PIKE
ROCKVILLE, MARYLAND 20852-3164

June 11, 1990

12453312 D

SUSAN J. MILLER
206 HOLLINGSWORTH MANOR
ELKTON MD 21921

Re: MACY'S
VS.
SUSAN J. MILLER

Our File No. 12453312 D

Your past due account is in our office for legal action.

It is imperative that you contact us immediately if you wish to make arrangements to pay this debt prior to additional litigation.

Very truly yours,

WOLPOFF AND ABRAMSON